Supreme Court, U.S.
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No. 02-167

In The Supreme Court of the United States

LYN-LEA TRAVEL CORP. d/b/a FIRST CLASS INTERNATIONAL TRAVEL MANAGEMENT,

Petitioners,

v.

AMERICAN AIRLINES, INC. and SABRE GROUP, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit err in holding that the Airline Deregulation Act of 1978 preempts a travel agent's state law tort claims based on an airline's alleged failure to disclose that it planned to reduce the commissions it paid for the sale of airline tickets and on the airline's grant of discounts on air travel to certain travel agents and corporate purchasers of air travel? Does the ADA preempt state law tort and deceptive trade practice claims challenging airline marketing and pricing activities?

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BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

Respondents respectfully urge this Court to deny the petition for a writ of certiorari, which seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

A. Lyn-Lea's dealings with American and Sabre

Lyn-Lea operates a travel agency that sells airline tickets for many airlines, including American. Lyn-Lea is authorized to sell tickets for American pursuant to an addendum to the Airline Reporting Commission Reporting Agreement (the "ARC Agreement"). The ARC Agreement provides that American will pay commissions to Lyn-Lea according to American's published commission schedule. The ARC Agreement expressly permits American to modify its commission schedule "at any time and from time to time."

In late 1994, to expand its business, Lyn-Lea bought a travel agency called "Air-O Travel." During the negotiations, Lyn-Lea discovered that Air-O had executed a term contract with American's Sabre division to use the SABRE computer reservations system ("SABRE"). Lyn-Lea was already contractually obligated to use WorldSpan, a competing computer reservations system. Lyn-Lea intended to honor its agreement with WorldSpan, and did not want to assume responsibility for Air-O's commitment to use SABRE. Consequently, Lyn-Lea began negotiating directly with American's Sabre division in an effort to reduce Lyn-Lea's overall commitment to use SABRE.

On December 7, 1994, Lyn-Lea and Sabre signed an agreement (the "CRS Agreement") that supplanted the Air-O agreement. The CRS Agreement provided that Sabre would supply Lyn-Lea with four computer terminals (rather than eight as required by the Air-O agreement), and that if Lyn-Lea reached certain performance goals, it could avoid the stipulated monthly use charges.

On February 10, 1995, American announced that, beginning February 27, 1995, American would cap its base commissions at $25 for one-way tickets and $50 for round-trip tickets. Lyn-Lea contends that American "knew" at the time it negotiated the CRS Agreement that it was going to reduce the commissions it paid for the sale of airline tickets, that state law imposed a duty on American to advise Lyn-Lea of this fact when negotiating the CRS Agreement, and that American failed to disclose its plans to Lyn-Lea.

After American's commission reduction, Lyn-Lea diminished and then ceased using SABRE, which triggered monthly usage charges under the CRS Agreement. Sabre sent Lyn-Lea an invoice requesting some $20,000 owed under the CRS Agreement, which Lyn-Lea did not pay. Consequently, Sabre terminated the CRS Agreement and demanded $102,079.17, the accrued amount owed thereunder. Shortly after that demand, Lyn-Lea filed this action.

B. American's dealings with third parties

In early 1997, Lyn-Lea entered into an exclusive booking agreement with MAI Systems ("MAI"). MAI had an existing direct agreement with American granting MAI a discount on American flights provided they were booked

on a Sabre CRS system. Lyn-Lea requested that American waive this condition for MAI, but American declined to do so. Lyn-Lea asserts that American's refusal to waive this term of the American-MAI contract amounts to tortious interference with Lyn-Lea's relationship with MAI.

In addition, Lyn-Lea contends that American utilized "waivers and favors"[1] to "steal" Lyn-Lea's client, Mendoza Dillon. Specifically, Lyn-Lea claims that by granting Nick Lugo Travel, a competing travel agency, favorable discounts in corporate fares, American enabled Nick Lugo to induce Mendoza Dillon to switch agencies. As with American's dealing with MAI, Lyn-Lea asserts that American's grant of those corporate discounts amounted to tortious interference with Lyn-Lea's relationship with Mendoza Dillon.

C. Proceedings in the courts below

Lyn-Lea claims that American's actions constitute intentional interference with business relationships and conspiracy, breach of contract, violations of the Texas Deceptive Trade Practices Act (the "DTPA"), fraud and misrepresentation. While the suit was pending, Sabre was "spun off" from American and assigned all of its rights under the CRS Agreement; Sabre thus became an independent party to the lawsuit.

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[1] These are special accommodations granted a customer such as waiving restrictions (e.g., a Saturday night stay) on lower-priced tickets. In short, they are a particular form of discount that allows a travel agent to let certain customers pay less than the "list" price for airline tickets.

By order dated December 2, 1997, the district court granted American summary judgment as to all of Lyn-Lea's claims, in part on the grounds that the claims were preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1). Pet. App. 30-55. Specifically, the district court held that Lyn-Lea's claims for tortious interference and conspiracy, violations of the DTPA, fraud and misrepresentation, and breach of the duty of good faith and fair dealing were preempted by the ADA. Significantly, the district court also granted summary judgment that Lyn-Lea's claims for breach of the CRS Agreement lacked evidentiary support.

Lyn-Lea did not appeal the district court's order on the merits of its breach of contract claim. The Fifth Circuit affirmed the remainder of the summary judgment on preemption grounds. Pet. App. 1-21.

REASONS TO DENY THE WRIT

This Court should deny Lyn-Lea's petition because this case presents a plain-vanilla application of preemption under the Airline Deregulation Act. Far from applying ADA preemption to "commercial conduct unrelated to air travel," as Lyn-Lea contends, the Fifth Circuit correctly found that Lyn-Lea's claims are preempted because they seek to impose state law constraints on American's practices and policies for marketing and selling air travel. Specifically, Lyn-Lea seeks to impose a supposed state law duty on American affirmatively to forewarn travel agents of its contemplated future marketing mechanisms and commission structures to sell air travel. Lyn-Lea also challenges the terms pursuant to which American sold air

travel to corporate customers. Accordingly, Lyn-Lea's claims squarely conflict with the purpose of the ADA, which is to "leave largely to the airlines themselves, and not at all to the States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228, 115 S.Ct. 817, 823 (1995).

Lyn-Lea points to disagreement among the circuits regarding whether the ADA preempts state-law personal injury claims based on issues such as smoking rules, injuries from falling baggage, and false imprisonment, but this case neither implicates that disagreement nor presents an opportunity for this Court to clarify the definition of "services." Regardless of whether the ADA preemption clause is construed narrowly or broadly over time, it will necessarily capture the claims at issue here, which relate directly to the means by which airlines market, distribute, and sell air travel, and thereby compete with one another.

A. The core of the ADA preemption clause is to prevent the States from indirectly regulating airline competition.

The ADA itself and this Court's interpretation of it make clear that a primary inquiry in ADA preemption cases is whether the state law at issue has a significant effect on the economics of competition among airlines. This Court first interpreted the preemption clause in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992). Discussing the history of the ADA and its stated purpose, this Court noted that Congress' focus was on the economic aspects of deregulation. *Morales*, 504 U.S. at 378, 112 S.Ct. at 2034 (noting that Congress determined that "'maximum reliance on competitive market forces'

would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality ... of air transportation services'") (*quoting* 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9)).

The Court went on to hold that certain state-law regulations regarding airfare advertising were preempted because of their significant effect on the economics of airline rates:

> [I]t is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares. Advertising serves to inform the public of the prices of products and services, and thus performs an indispensable role in the allocation of resources. Restrictions on advertising serve to increase the difficulty of discovering the lowest cost seller and reduce the incentive to price competitively.

Morales, 504 U.S. at 388, 112 S.Ct. at 2039 (internal citations omitted). The Court made it clear that the outcome of a preemption inquiry vis-à-vis airline rates depends on the substantive relation of the state law to the rates, and not strictly on just how sweeping the term "relating to" is construed as it appears in the ADA preemption clause.

This Court construed the ADA preemption clause again in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995). *Wolens*, like *Morales*, focused on economics and held that certain state laws were preempted because they limited airlines' marketing practices: "In light of the full text of the preemption clause, and of the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of

air transportation services, we conclude that § 1305(a)(1) preempts plaintiffs' claims under the Consumer Fraud Act." *Wolens*, 513 U.S. at 228, 115 S.Ct. at 823-824. Again, the Court's decision to preempt the state law was based on the law's relation to economic competition among airlines and not strictly on the precise breadth of the term "relating to."

Like the Attorney Generals' advertising guidelines in *Morales*, Lyn-Lea seeks to impose state law limits on airlines' marketing practices. Lyn-Lea's tortious interference claim challenges American's practices of charging different rates to different customers and granting certain travel agents the ability to offer special discounts. For example, this Court has held that ticket restrictions such as day-of-week restrictions bear a "reference to airfares," *Morales*, 504 U.S. at 388, 112 S.Ct. at 2039, yet Lyn-Lea's torticus interference claim is based on American allowing another travel agent to waive restrictions such as a Saturday night stay for certain corporate customers.

Similarly, Lyn-Lea's fraud claim seeks to impose state law duties on airlines to disclose their plans for how, and on what terms, to market air travel through travel agents. According to Lyn-Lea, American was obliged to tell Lyn-Lea, in advance, that it planned to implement a cap on travel agent commissions for sales of airline tickets.[2] In its summary judgment order, the district court explained that, as a matter of basic economics, reductions in commissions have a significant effect on airline rates:

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[2] Ironically, Lyn-Lea and other travel agents took the position in a nation-wide class action lawsuit that advance announcements by airlines of upcoming commission cuts constituted price-fixing in violation of federal anti-trust statutes.

> Commissions paid to travel agents are operating costs for airlines. To the extent an airline is able to reduce its operating costs, the airline places itself in a position to pass these savings along to the consumers in the form of lower rates for airfare. Thus, any change in an airline's commission practices necessarily has a significant impact upon the fares they charge.

Pet. App. 47-48. The commission reduction has a particularly significant effect when the variable cost to be reduced is 10% of the total sales price, which was the case at the time the CRS Agreement was negotiated.

Even more directly than state laws aimed at fare advertising, Lyn-Lea's common-law and statutory claims interfere with the economic aspects of the airline business, because at their core they seek to impose state law limits on how much American charges particular customers for airline tickets, and how American pays travel agents for the sale of tickets. This case "plainly does not present a borderline question." *See Morales*, 504 U.S. at 390, 112 S.Ct. at 2040. There cannot be a more clear relation between the state law at issue and American's rates.

B. This case is not about CRS services or breach of contract.

Lyn-Lea tries to paint the Fifth Circuit as having applied preemption to areas far afield from core airline economic competition. That contention is contrary to the record. First, the district court granted summary judgment on the merits that neither American nor Lyn-Lea breached the CRS Agreement, and Lyn-Lea did not appeal that decision. Second, it is irrelevant to Lyn-Lea's claims that Sabre as a CRS provider allows for booking

non-airline matters such as rental cars and hotels. Lyn-Lea's claims do not involve Sabre or American's practices with respect to rental cars or hotels. What Lyn-Lea complains about is that American did not tell Lyn-Lea in advance that it might reduce the commissions it paid for the sale of air travel, and that American's grant of discounts on air travel caused certain customers to purchase air travel through a travel agency other than Lyn-Lea.

Nor does this case fall within the *Wolens* category of "routine breach of contract claims" that are not subject to preemption, because Lyn-Lea makes no claim that American failed to live up to some voluntarily-undertaken obligation. As stated above, Lyn-Lea did not appeal the district court's summary judgment on the merits of its claim for breach of the CRS Agreement. Further, Lyn-Lea does not challenge the plain language of the ARC Agreement granting American the express right to change commissions "at any time and from time to time." Instead, Lyn-Lea seeks to impose on American an obligation found nowhere in the ARC Agreement (or any other agreement), but rather created (if at all) wholly by "state laws or policies external to the agreement." *See Wolens*, 513 U.S. at 233, 115 S.Ct. at 826. Specifically, Lyn-Lea seeks to impose on American a state-law duty to have disclosed its upcoming commission change while it was negotiating the CRS Agreement.[3] While it may be difficult to draw a

[3] Although neither the district court nor the Fifth Circuit found it necessary to reach the issue, in fact, such a duty does not exist at common law, because there is no fiduciary or special relationship between the parties. *See Bado Equip. Co., Inc. v. Bethlehem Steel Corp.*, 814 S.W.2d 464, 475 (Tex. App. – Houston [14th Dist] 1991, no writ).

meaningful line between breach of contract and fraud in some instances, Lyn-Lea's claims here fall squarely within the preemption territory this Court defined in *Wolens*.

C. Any disagreement between the Circuits is not implicated here.

Lyn-Lea argues that the circuit courts disagree as to how broadly the term "services" should be construed as it appears in the ADA preemption clause, and that this Court should use this case as a vehicle to provide a "closer working out" of the issues in those cases. Petition at 10-11. Indeed, three members of this Court previously noted a disagreement among the circuit courts, and argued that this Court should grant certiorari in a case in order to provide guidance on certain preemption issues. *Northwest Airlines, Inc. v. Duncan*, ___ U.S. ___, 121 S.Ct. 650 (2000). This is not the right case to provide that guidance, because this case involves purely economic issues.

A review of the cases cited in Lyn-Lea's petition as reflecting a disagreement among the circuits demonstrates that the area of disagreement involves non-economic activities, and whether they fall within the ADA's definition of "services." For example, *Duncan* involved airline smoking rules, and whether a flight attendant's suit for damages from second-hand smoke related to airline "services" for preemption purposes. *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 650 (2000). Similarly, the case in which the Ninth Circuit adopted a narrow definition of "services" involved five consolidated suits by airline passengers for personal injuries caused by beverage carts,

luggage, or falls. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-1266 (9th Cir. 1998) (*en banc*). The Fifth Circuit's seminal case defining "services" involved personal injuries suffered when a case of rum fell from an overhead compartment. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 337 (5th Cir. 1995) (*en banc*). Other cases involve defamation claims arising out of ticketing practices and complaints about a passenger who failed to show identification being refused the right to board a flight. *Taj Mahal Travel v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998); *Smith v. Comair*, 134 F.3d 254 (4th Cir. 1998); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996). The "services" at issue in those cases thus involved not economic issues, but rather basic activities involved in flights: storing luggage, providing food and drink, boarding practices, and the like.

Indeed, even under the Ninth Circuit's more restrictive standard of preemption – which asks whether "the state laws underlying the claims frustrate the goal of economic deregulation by interfering with the forces of competition" – Lyn-Lea's claims would be preempted because they seek to impose state law restraints on airline pricing and marketing practices. *Charas*, 160 F.3d at 1263. Because the issues in this case involve strictly economics and competition, this case does not present an appropriate vehicle for this Court to provide guidance to the circuit courts regarding the term "services."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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